IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs July 10, 2007

STATE OF TENNESSEE v. RICKY E. SCOVILLE

Appeal from the Circuit Court for Marshall County
No. 16906 Robert Crigler, Judge

No. M2006-01684-CCA-R3-CD - Filed September 11, 2007

The Appellant, Ricky E. Scoville, appeals his misdemeanor convictions by a Marshall County jury for the crimes of aggravated criminal trespass and criminal littering. On appeal, Scoville raises two issues for our review: (1) whether evidence of prior acts by Scoville was improperly admitted at trial; and (2) whether the evidence presented at trial was legally sufficient to support the convictions. Following a review of the record, we conclude that Scoville's first issue is waived, as it was not raised in the motion for new trial. We further conclude that the evidence presented at trial was more than sufficient to support the convictions. Accordingly, the judgments of conviction are affirmed.

Tenn. R. App. P. 3; Judgment of the Circuit Court Affirmed

DAVID G. HAYES, J., delivered the opinion of the court, in which THOMAS T. WOODALL and NORMA MCGEE OGLE, JJ., joined.

Scott C. Williams and Matthew W. McInteer, Nashville, Tennessee, for the Appellant, Ricky E. Scoville.

Robert E. Cooper, Jr., Attorney General and Reporter; Lacy Wilber, Assistant Attorney General; Weakley E. Barnard, District Attorney General Pro Tem, for the Appellee, State of Tennessee.

OPINION

Factual Background

Shortly after midnight on July 27, 2005, the minor daughter of Marvin and Brenda Johnson awoke when the family's dog began barking loudly outside their house in Lewisburg. When the Johnsons' daughter looked out her bedroom window, she saw the Appellant approach the fence enclosing the Johnsons' back yard with something in his hand, which he subsequently placed on the ground. The Johnsons' daughter went to her parents' bedroom and woke them, and Mr. Johnson looked out their bedroom window to see the Appellant standing outside on the Johnsons' front lawn. Mr. Johnson saw the Appellant drop two or three tree limbs in the front yard, approximately twelve to fifteen feet from where Mr. Johnson was standing inside.

Mr. Johnson went out onto the front porch of the house, and he made eye contact with the Appellant, who was now standing approximately thirty to thirty-five feet away from Mr. Johnson but still on the Johnsons' property. The property was equipped with security lights on the roof of the house, and the house was located on a corner near a street light. As Mr. Johnson watched from his front porch, the Appellant left the yard and went across the street, where he picked up a can of beer. The Appellant then walked back onto the Johnsons' property where he proceeded to pour beer onto the Johnsons' driveway and throw the empty beer can into the Johnsons' yard. Meanwhile, Mrs. Johnson called the police from inside the house. By the time the police arrived at the scene, the Appellant had walked down the street and out of sight.

On October 26, 2005, a Marshall County grand jury indicted the Appellant for the misdemeanor offenses of aggravated criminal trespass and criminal littering. After a April 26, 2006 trial, a jury convicted the Appellant of the crimes charged, and, on June 7, 2006, the trial court entered judgment on the convictions. The Appellant filed a motion for new trial on July 6, 2006, which the trial court denied by order *nunc pro tunc* for July 12, 2006. The Appellant timely filed a notice of appeal.

Analysis

I. Evidence of Prior Acts by the Appellant

On appeal, the Appellant first contends that the trial court erred by allowing Mr. Johnson to testify regarding "various wrongs and acts he alleged were carried out [primarily in 2003] on or near his property by someone he believes to be [the] Appellant." The acts described by Mr. Johnson during his testimony related to instances in which the Appellant had allegedly sat in his truck across from the Johnsons' property and raced his engine, repeatedly driven slowly past the Johnsons' home, and even stopped his vehicle in front of the house to stare at Mrs. Johnson and her daughter while they were outside doing yard work. The Appellant argues that this testimony was not relevant under the Tennessee Rules of Evidence and that it should have been excluded by the trial court.

The Tennessee Rules of Appellate Procedure provide in part:

> that in all cases tried by a jury, *no issue presented for review shall be predicated upon error in the admission or exclusion of evidence*, jury instructions granted or refused, misconduct of jurors, parties or counsel, or other action committed or occurring during the trial of the case, or other ground upon which a new trial is sought, *unless the same was specifically stated in a motion for a new trial*; otherwise such issues will be treated as waived.

Tenn. R. App. P. 3(e) (2006) (emphasis added). Our review of the record leads us to conclude that the Appellant has waived his right to present the issue for consideration by this court by failing to include this alleged error in his motion for a new trial. In the Appellant's motion for a new trial, his

only stated basis for relief was "that the verdict of the jury in this cause is against the weight of the evidence presented at trial." Clearly, this does not encompass the challenged evidentiary error.

Rule 52(b) of the Tennessee Rules of Criminal Procedure provides that "[w]hen necessary to do substantial justice, an appellate court may consider an error that has affected the substantial rights of an accused at any time, even though the error was not raised in the motion for a new trial or assigned as error on appeal." We decline plain error review of this issue because it does not rise to the level of affecting a substantial right which would necessitate review in order to do substantial justice. *See* Tenn. R. Crim. P. 52(b). As previously noted by this court, rarely will plain error review extend to an evidentiary issue. *Dorman O'Neal Elmore, Jr. v State*, No. E2005-02263-CCA-R3-PC (Tenn. Crim. App. at Knoxville, Aug. 29, 2006).

II. Sufficiency of the Evidence

The Appellant further argues generally that "the evidence was legally insufficient for a rational trier of fact to find her [sic] guilty beyond a reasonable doubt." We presume that the Appellant challenges the sufficiency of the evidence supporting both convictions.

Due process requires that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof, which is defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense. *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 2787 (1979). A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal, a convicted defendant has the burden of demonstrating that the evidence is insufficient. *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982).

In our review of the issue of sufficiency of the evidence, the relevant question is "whether, after viewing the evidence in the light most favorable to the [State], *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789 (emphasis in original); *see also* Tenn. R. App. P. 13(e). Moreover, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). The weight and credibility of the witnesses' testimony are matters entrusted exclusively to the jury as triers of fact. *State v. Strickland*, 885 S.W.2d 85, 87 (Tenn. Crim. App. 1994).

a. Aggravated Criminal Trespass

The Appellant was convicted of one count of aggravated criminal trespass. Aggravated criminal trespass is defined by statute as follows:

> (a) A person commits aggravated criminal trespass who enters or remains on property when:

(1) The person knows the person does not have the property owner's effective consent to do so; and

(2) The person intends, knows, or is reckless about whether such person's presence will cause fear for the safety of another.

T.C.A. § 39-14-406(a) (2006).

At trial, all three of the aforementioned members of the Johnson family identified the Appellant as the person they witnessed standing and walking on their property between 12:00 and 12:30 a.m. on July 27, 2005. These witnesses testified that their yard was well illuminated by security lights on the roof of the house and at least one streetlight on a nearby corner. It is well-established that the identification of a defendant as the person who committed the offense for which he is on trial is a question of fact for the determination of the jury upon consideration of all competent proof. *Strickland*, 885 S.W.2d at 87. The credible testimony of one identification witness is sufficient to support a conviction if the witness viewed the accused under such circumstances as would permit a positive identification to be made. *State v. Radley*, 29 S.W.3d 532, 537 (Tenn. Crim. App. 1999). Mr. Johnson testified that when he saw the Appellant place two or three tree limbs in his yard, the Appellant was standing between twelve and fifteen feet from the house. After a review of the entire record, we conclude that the evidence presented by the State in this case was more than sufficient to support the conviction for aggravated criminal trespass.

b. Criminal Littering

Criminal littering, as relevant in this case, occurs when a person "[k]nowingly places, drops or throws litter on any public or private property without permission and does not immediately remove it." T.C.A. § 39-14-502(a)(1) (2006). Both Mr. and Mrs. Johnson, as well as their minor daughter, provided undisputed testimony that shortly after they noticed his presence in their yard, the Appellant briefly left their property and walked across the street to retrieve a beer can, which he then poured out onto the driveway and discarded onto the Johnsons' yard. Mr. and Mrs. Johnson also testified that the Appellant did not remove the beer can from their property but that Mrs. Johnson later retrieved it, as well as the tree limbs the Appellant placed in the yard. After a review of the entire record, we conclude that the evidence presented by the State in this case was more than sufficient to support the conviction for criminal littering.

CONCLUSION

Based upon the foregoing, the judgments of the Marshall County Circuit Court are affirmed.

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DAVID G. HAYES, JUDGE